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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

TURNER GLASS CORPORATION, Petitioner, vs. HARTFORD-EMPIRE COMPANY, OWENS-ILLINOIS GLASS COMPANY, HAZEL-ATLAS GLASS COMPANY, CORNING GLASS WORKS, THATCHER MANUFACTURING COMPANY, GLASS CONTAINER ASSOCIATION OF AMERICA, INC., THE STEVENSON CORPORATION, Respondents.	No. 92.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

RESPONDENTS' CONTENTIONS.

Respondents' brief in opposition to the petition for writ of certiorari asserts that:

1. No issue of the right to recover the license fees and royalties illegally charged by respondents has been asserted.

2. Notwithstanding

(a) the payment by petitioner of royalties and license fees to respondents that were "the immediate

product of the conspiracy" (Hartford Empire v. U. S., 324 U. S. 386; U. S. v. National Lead Co., 332 U. S. 319; and

(b) a receivership of petitioner upon the complaint of Hartford for unpaid royalties,

petitioner has no right to recover under the anti-trust laws because of its weakened financial condition and asserted destruction by the depression.

3. The license agreements, admittedly illegal in furtherance of the conspiracy and admittedly "for the purpose of controlling the industry" (Res. Br., p. 16) were nevertheless not inherently illegal; were not adjudged to be illegal by this court in Hartford Empire v. U. S., 323 U. S. 386, 324 U. S. 570; and petitioner therefore has no right to recover such illegal payments of license fees and royalties as damages under the anti-trust laws.

4. Recovery by petitioner would penalize respondents and would permit others so injured to recover also.

5. Reliance upon proposed findings not adopted by the Toledo Court where petitioner was not a party and not offered or admitted in evidence in this cause was proper. That "it was not only proper but necessary to examine the rejected findings" (Res. Br., p. 38) and that "it was immaterial whether they were offered in evidence."

RIGHT TO RECOVER ROYALTIES AND LICENSE FEES IN ISSUE.

Respondents' first assertion, that the right of petitioner to recover royalties and license fees illegally procured is not an issue in this case, is patently untrue.

Petitioner's amended and supplemental complaint alleges (a) the restrictive licensing of Hartford and Owens has

been beyond the scope of the patent laws and in violation of the anti-trust laws (Comp. paras. 60-70, incl.; R. 43-48), and (b) the license fees and royalties paid by petitioner to Hartford during the period of the conspiracy, combination and monopoly, placed petitioner at a competitive disadvantage which directly caused injury and damage to petitioner's business and property (Comp. paras. 80A, R. 62).

The amount of the royalties and license fees paid by petitioner was stipulated and found by the Special Master (R. 1033-1036). The right to such recovery has been asserted by petitioner and contested by respondents at every step in this law suit and is squarely presented in the petition for the writ of certiorari.

PETITIONER'S RIGHT TO LIVE.

With respect to the second contention that petitioner was destroyed by the depression, respondents are compelled to maintain this position:

(a) Although it is established that respondents, except Stevenson, have violated the anti-trust laws and engaged in an unlawful conspiracy, combination and monopoly to dominate and control the glass container manufacturing industry or drive out of such business trouble makers or price cutters of which petitioner was one (46 F. Supp. 541, 587);

(b) respondents have built "one of the tightest monopolies in American history" largely to retain their illegal gains and continue their hold on the economy (Justice Douglas in Standard Oil Co. v. U. S., 17 L. W. 4510, 4517);

(c) respondents drained petitioner of its funds through the payment of royalties and license fees un-

der illegal license lease agreements, to which payments they had no right under the patent laws or others and which have been adjudged "the immediate product of the conspiracy";

(d) the license fees and royalties paid to Hartford were secretly shared with petitioner's competitor, Owens, for the adjudged and admitted purpose of giving a competitive edge to Owens;

(e) petitioner was put into receivership by respondent, Hartford, for unpaid royalties; and

(f) its assets and business purchased by a company formed by respondents Hartford and Thatcher (Toledo finding 600, R. 823);

yet the respondents come before this Court and proclaim that petitioner has suffered no legal damage since it was allegedly destroyed by the depresssion "commencing with the stock market crash in October 1929" (Res. Br. p. 5).

Respondents stoutly maintain petitioner was destroyed by the depression and further assert (Res. Br. p. 5) that "the entire glass container industry, however, was adversely affected by the severe business depression which became apparent during the summer of that year (1929)". This assertion is unsupported by any evidence or any inference from any evidence in this record or the Toledo record which was before this Court in Hartford Empire v. United States, 323 U. S. 386. Some adverse affects were felt during 1932, but respondents had disposed of petitioner in 1930.

As previously pointed out (Pet. Br., p. 15) petitioner's two glass container manufacturing plants were sold by the receiver appointed on complaint of Hartford on April 3, 1931 to General Glass Corporation, a corporation formed by

Hartford and Thatcher (Toledo Finding 600, R. 823), for $6,000, subject to the lien of a mortgage and the assumption of unpaid taxes in the amount of $24,950. Only the Winchester plant was operated by General. The Terre Haute plant was subsequently dismantled. Despite the one plant operation General had net sales of glass containers from April 1, 1931 to December 31, 1931 of $1,051,770.35 and for the year of 1932 of $3,055,938.18. The land, buildings, machinery and equipment of the one plant was carried on the 1931 balance sheet of General at $1,810,680.43 (Toledo Rec. 8042A).

Strange indeed it is that in 1929 Owens', despite respondents' asserted depression, total sales reached $37,322,828, an increase over 1928 of some $15,000,000. In 1931 Owens' total sales were $34,784,230 (Toledo Record p. 7930A). In 1929 Owens' total production by gross of glass containers was 10,906,707 while in 1931 it produced 9,923,452 gross (Toledo Rec. p. 7930C). In 1929 Owens received in total royalties $2,410,972.33, in 1930 it received $2,306,843.24, and in 1931, $2,259,414.86 (Toledo Rec. p. 7930G).

The Hazel Atlas consolidated balance sheets for the years 1929, 1930, 1931 (Toledo Rec. 7938, 7939, 7940 and 7941) show no disastrous depression results such as respondents picture.

Ball Bros. Company, with its chief plants at Muncie, Indiana, and within a few miles of petitioner's Winchester, Indiana plant, showed net profits after taxes as follows: 1929—$916,180.86; 1930—$1,367,819.48 and 1931—$4,423,334.77 (Toledo Rec. p. 8066).

Corning in 1929 had operating net income of 34% of net sales, the highest of any year since 1923. In 1930 it enjoyed 19.8% as against a 16 year average of 21% (R. 691-692). In 1929 Hartford secretly paid Owens $497,000; in

1930 Hartford paid $463,000. These enormous sums were only one-half of Hartford's net income after deducting $600,000. Thus, if Hartford was honest in its secret payments to Owens, Hartford had an income in 1929 and 1930 of more than $1,500,000. These payments were in excess of any prior year since 1924. Such income for a company whose assets were largely intangibles such as patents hardly reflects the severe effects of the depression in the glass container industry which respondents attempt to picture. Respondents, when challenged to do so, which challenge is reiterated here, could show no manufacturer in the glass container industry which was destroyed by the depression. Moreover, public documents refute the contention of an adverse effect on the entire industry in 1929 or 1930. See: TNEC Rep., part 2, pages 806-807. Respondents contend that petitioner however was the one exception.

The contention of financial distress of one victimized by a conspiracy was made in Story Parchment Co. v. Patterson Parchment Co., 282 U. S. 555, 75 L. Ed. 544, and was rejected by this Court in reversing the Court of Appeals (37 Fed. 2d 537). The dissenting opinion of the Court of Appeals confirmed by this Court points up the legal proposition (37 Fed. 2d 537, 544):

> "The conclusion is (to repeat) that, without the defendant's conspiracy to put the plaintiff out of business, it would have died anyway. The logic is, in that regard, hardly distinguishable from setting up the mortality of one as a defense to an indictment for manslaughter or murder. The undeniable facts are that the defendants conspired to kill the plaintiff and the plaintiff died. The majority opinion is to the effect that the conspiracy was unnecessary; that the plaintiff would have died anyway. I do not assent to such reasoning or to its results" (see: 43 Harv. L. R. 1163).

So here, it is mere speculation to assert now that petitioner would have died had Hartford not come forward with the coup de grace, especially if the facts of the conspiracy had been known.

Similarly, in Bigelow v. R. K. O. Radio Pictures (from the same circuit as this case) 327 U. S. 251; 90 L. Ed. 1040, this court held in reversing the Court of Appeals that the plaintiff was entitled to conduct and continue his business free of restraints. See also: Columbia Gas and Electric Co. v. U. S., 151 Fed. 2d 461 (certiorari denied, 329 U. S. 737).

The legal principle involved is basic that respondents who act tortuously for the purpose of causing harm to petitioner's pecuniary interests are liable for the results, even though the harm results from an outside source, if the risk of such harm is increased by respondents' acts (Sec. 870, Restatement of Torts on Intended Harms).

The payment by petitioner to Hartford of royalties and license fees in excess of $1,000,000 shared in secretly by petitioner's competitor Owens, during the period of the illegal conspiracy, combination and monopoly, drained petitioner of its working capital and weakened it financially. Such tribute from petitioner, secretly shared by Owens to effect a competitive edge, as adjudged, at least increased the risk of harm to petitioner.

Each payment of license fees and royalties and each secret split by Hartford with petitioner's competitor Owens, all culminating in the subsequent receivership action brought by Hartford for unpaid royalties, was an overt act of the conspiracy which directly injured and damaged petitioner in its business and property, the right to recovery for which is given and measured by the antitrust laws.

ILLEGALITY OF LICENSE AGREEMENTS AND PETITIONER'S RIGHT TO RECOVERY.

Respondents contend that petitioner has no right to recover the royalties and license fees and the Hartford licenses at most were only collaterally illegal.

The findings of fact and conclusions of law in the Toledo case confirmed by this court afford the answer to the contrary of respondents' contention (Findings 471-473, R. 793; Findings 450, 451, 452, 456, 466, 467, 469, R. 789-792; Conclusions of Law 31-34, R. 840-841; 82-84, R. 852-853).

This court has stated in U. S. v. National Lead Co., 332 U. S. 319, at page 360:

> "In that case (referring to Hartford Empire v. U. S.) the court was dealing with a licensor organization which had no use for patents except for the resulting control over licensing . . ."

The Hartford licenses illegally restricting the manufacture and sale of unpatented glass containers wholly beyond any lawful patent monopoly, were the very core of the conspiracy, combination and monopoly, and were intended to be so by respondents.

They were in no sense collateral to the illegal conspiracy and this court has never considered them so.

The respondents have stipulated in this case that:

> "At all relevant times, all licenses granted by Hartford-Empire were restricted to certain types or kinds of glassware, and such licensees were specifically excluded from using feeders so licensed for other types and kinds of glassware. Such provision did not apply to certain machinery other than feeders licensed by Hartford-Empire" (Para. XLI, Rec. p. 1033).

It was also stipulated that:

> "Certain of Hartford-Empire license agreements relating to lehrs formerly included a provision limiting the use of licensed lehrs to use in connection with other Hartford-Empire machines, to wit: feeders. These restrictions were not included in Hartford lehr contracts issued subsequent to 1936, but all such provisions were not removed until 1939" (Para. XL, Rec. p. 1032).

Both the restrictions and the tying clauses were held illegal by the Toledo Court and this court. 46 F. Supp. 541; 323 U. S. 386; 324 U. S. 570 (Final Judgment Para. 19A, R. 886-889).

Respondents say that to permit petitioner to recover would "confer on it a profit by reason of such violation. This is particularly true where, as the Court of Appeals noted, the Toledo case found that 'The Hartford royalties have been passed on to the ultimate consumer' . . . There is no finding to the contrary here".

The finding of the Toledo Court to which respondents refer, relative to royalties being passed on, did not include this petitioner; it was not a party at Toledo. The special master in this case did not find that petitioner passed the royalties and license fees on to ultimate consumers, he found no more than did the Toledo Court. His failure to so find is a finding against respondents on the issue.

There is no evidence in this record that petitioner passed on the royalties and license fees or was able to do so and it is contrary to the established facts.

Respondents wholly overlook the fact that Hartford obtained the royalties and license fees by illegal conduct; they overlook the fact that Owens received approximately

one-half of all petitioner paid and $440,000 per year of free machinery: Owens a competitor of petitioner. Owens reaped a profit of millions much of which came from its competitors without their knowledge or consent.

That petitioner paid royalties and license fees to Hartford in the amount of $1,023,828.32, during the period of the conspiracy from 1924 to petitioner's receivership (R. 1033-1034), which were secretly split by Hartford with Owens is not only not disputed (R. 574, 704-705) but has been stipulated (R. 1029). Respondents do not deny the advantage to Hartford and Owens under their arrangement but seek only to justify and speculate as to such advantages (Res. Br. pages 28-31).

That Owens and Turner were competitors is established in this case (Finding No. 5, R. 574). The Toledo Court found (Finding No. 123, R. 704-705):

> "As a result of the 1924 agreement which gave Owens a share in Hartford royalties, a right to forty free feeders and formers, and an invention's license, Owens was placed and maintained in a dominant position over its competitors."

This finding is passed over lightly by respondents. The advantage was illegal and damaged petitioner in its business and property (46 Fed. Supp. 541, 561, 564, 568, 570; Conc. of Law, 6 and 55, R. 831 and 846).

The competitive disadvantage to which petitioner was put is aptly characterized by Justice Douglas, concurred in by Justices Murphy and Rutledge in U. S. v. National Lead Co., 332 U. S. 319, 368:

> "Each dollar of royalty adds a dollar to the costs of the new competitor and gives the established licensor another dollar with which to fight that competition."

In the instant case Owens took a share of every dollar paid by petitioner to Hartford, to effect this competitive edge. No rational basis can be found for contending that such a cost can be passed on and no basis for such a contention exists in fact on this record. Greater injury or damage to petitioner's business and property in an economic sense cannot be conceived.

Respondents in effect are saying that the restitution fixed by Congress is too high. Justices Rutledge and Black have answered this contention well. They say in a vigorous dissent:

> "The power, and much of the property, now aggregated in the combination's hands and those of its principal participant, was gathered by unlawful methods at the expense of the public and competitors. Presumably neither power nor property could have been accumulated by lawful means . . . (323 U. S. 442). But the pool has acquired more than 800 patents, which control the industry, of which Hartford alone holds more than 600 . . . Many of the patents, and certainly the cherished 'patent position', were secured only by virtue of the illegal conduct . . . **Every dollar hereafter, as well as heretofore, secured from licenses on the patents illegally aggregated in the combination's hands is money to which the participants are not entitled by virtue of the patent laws or others**" (emphasis supplied) (323 U. S. 443) (Cf. Justices Douglas, Murphy and Rutledge dissent in U. S. v. National Lead Co., 332 U. S. 317, 364, at 367).

Petitioner contends that the rule thus stated by four Justices in the Hartford and National Lead cases, governs its right to recovery of the royalties and license fees in this action, and the refusal of the Court of Appeals to so

hold is in conflict therewith. The question is one that should be settled by this court under the anti-trust laws.

Respondents' arguments in opposition to petitioner's right to recovery of royalties and license fees, although obliquely stated, go in fact to the question of the amount of petitioner's damage—not the fact of damage. The distinction is clear and decisions of this court are pertinent. Bigelow v. R. K. O. Radio Pictures, 327 U. S. 251; Story Parchment Co. v. Patterson Parchment Co., 282 U. S. 555; Eastman Kodak v. Southern Photo Materials, 273 U. S. 359.

Furthermore, respondents introduced no evidence on quantum meruit. Despite the availability of many persons (R. 990 to 1003) who participated in the conspiracy, combination and monopoly, not one was called.

The assertion by respondents (Res. Br., page 19) that there was no determination in U. S. v. Hartford Empire that the Hartford royalties were excessive and unreasonable is untrue.

In the second opinion, Hartford Empire v. U. S., 324 U. S. 570, at 574, this court said:

> "The Government apprehends that the use of the word 'standard' with respect to the royalties to be charged by Hartford may be taken as a determination that **present royalties are reasonable. To avoid any misunderstanding** we substitute for the phrase 'standard royalties' the phrase 'uniform reasonable royalties.'" (Emphasis supplied.)

If respondents intend that the inference be drawn from the quotation (Res. Br., p. 19) that Hartford royalties, prior to the Toledo case, were reasonable and so considered by this court, then the quotation out of context is

wholly misleading. The "standard" royalties referred to were those forced by the Government action. This court stated, 323 U. S. 386, 408:

> "At the time of the District Court's decision, Hartford had reduced the royalties of all its licensees to its **then schedule of standard royalties.**" (Emphasis supplied.)

Clearly this court did not want it understood that Hartford royalties charged prior to the Toledo case were either standard or reasonable and thus clarified it by the second opinion.

Respondents' reliance upon **Northwestern Oil Co. v. Socony Vacuum Oil Co.**, 138 F. (2d) 967; **Clark Oil Co. v. Phillips Petroleum Co.**, 148 F. (2d) 580, and **Twin Ports Oil Co. v. Pure Oil Co.**, 119 F. (2d) 747 (Res. Br., p. 321) is unfounded. In each of these cases plaintiffs were jobbers who at all times were assured of a **fixed margin** between the cost and the sale price of gasoline. Although illegal increases were effected by defendants, the jobbers' margins **remained fixed.** In the **Northwestern** case the plaintiff jobber was found to be a party to the conspiracy. Thus, recovery in treble damages under the anti-trust laws was denied the jobbers. It cannot be contended that petitioner here was ever assured of any fixed margin, and on the contrary, was paying tribute to its competitor Owens through payments to Hartford which it shared with Owens.

Similarly, **Alden Rochelle Inc. v. American Society of Composers**, 79 F. Supp. 315, does not support respondents' view to defeat petitioner's recovery. In that case damages were denied on the ground that the rates were fixed by negotiations between all the exhibitors and ASCAP which were fair, reasonable and uniform and that the exhibitors paid for and received value as expected in performing rights licensed and further that there was no evidence

of overcharge. In the instant case the license fees and royalties have been adjudged excessive, unreasonable and discriminatory, and petitioner certainly cannot be found to have received what it paid for when its royalties and license fees were secretly shared by Hartford with Owens through conspiracy and combination.

Petitioner was given no opportunity to negotiate royalties or license fees it was required to pay Hartford, nor so far as petitioner knows was any other licensee except the favored few, who were the conspirators, ever permitted to negotiate license fees and royalties to be paid. The fees were fixed by Hartford probably after consultation with Owens and Corning.

RESPONDENTS' CLAIM OF PENALTY AND FORFEITURE.

Respondents rely upon the plea that petitioner's recovery in this action would constitute a forfeiture and confiscation of their property, and penalize them in a manner not provided by the anti-trust laws. Such contention is authoritatively answered by the Anti-trust Statute providing the treble damage remedy. Furthermore, the money was obtained illegally and is not the property of respondents.

As pointed out by this court (324 U. S. 570, 571), Hartford is entitled to compensation for the use of its machinery on a quantum meruit basis—a right petitioner has never denied. Thus, any contention by respondents of "free use of machinery" and subsequent penalty if petitioner is permitted recovery in this action is negatived and entirely without merit. The burden of showing such quantum meruit right rested with respondents and goes to the amount of damage, not the fact of damage. This

burden they declined to assume and rested at the close of petitioner's case.

This court in the Toledo case clearly stated the right of licensees to contest the payment of royalties under the illegal licenses and leases and to recover funds paid into the registry of the Toledo Court.

This court in Schine Chain Theatres, Inc., v. U. S., 334 U. S. 110, stated:

> "In this type of case we start from the premises that an injunction against future violations is not adequate to protect the public interest. If all that was done was to forbid a repetition of the illegal conduct, those who had unlawfully built their empires could preserve them intact. They could retain the full dividends of their monopolistic practices and profit from the unlawful restraints of trade which they had inflicted on competitors. Such a course would make enforcement of the Act a futile thing unless per chance the United States moved in at the incipient stages of the unlawful project. For these reasons divestiture or dissolution is an essential feature of these decrees.
>
> "To require divestiture of theaters unlawfully acquired is not to add to the penalties that Congress has provided in the anti-trust laws. **Like restitution it merely deprives a defendant of the gains from his wrongful conduct.** It is an equitable remedy designed in the public interest to undo what could have been prevented had the defendants not outdistanced the Government in their unlawful project * * *." (Emphasis supplied.)

PETITIONER'S PRIMA FACIE CASE AND REJECTED FINDINGS.

Respondents built one of the tightest monopolies known in American history through fraud and violations of the anti-trust laws of the grossest sort. Hazel Atlas v. Hartford Empire, 322 U. S. 238; Shawkee Mfg. Co. v. Hartford Empire, 322 U. S. 271. They now seek to oppose the granting of this Writ of Certiorari by using the decisions of this court, adjudging their guilt, as a shield to protect their empire and the spoils of their illegal practices.

Thus, they seek to thwart the intent and express provisions of Section 5 of the Clayton Act, which gives that final decree in this action the probative force of prima facie evidence against them. This they have no standing to do and this court's power of supervision and review is called for.

Moreover, as a sword, they use the device of "rejected findings"—tendered findings by Government counsel at Toledo not adopted by that court—to cut down and limit the scope and effect of the final decree in that case. Petitioner was not a party to the Toledo case. The rejected findings were never offered in evidence in this case and are no part of this record, a matter respondents deem immaterial to consideration by this court.

The dangers inhering in a rule authorizing reliance upon proposed findings not adopted by a court in another case and not in the record in the instant case, are too obvious to need exposition. Ohio Bell Telephone Co. v. The Public Utilities Commission, 301 U. S. 292.

Petitioner does not believe that the statements referring to "the rejection of findings" in the opinion of Justice

Roberts, 323 U. S. 386, 403, 405, were intended to afford these respondents, there adjudged guilty, the right to use such rejected findings in another action to limit in any way the scope and effect of the decision and judgment in the Toledo case. They have no standing to dilute the condemnation of their wrongs.

Decisions cited by respondents (Res. Br. p. 38) concerning res judicata questions, removal actions and cases where suits were filed in both State and Federal courts, are no authority for reliance upon rejected findings on the theory that they appear in the Toledo record as here asserted.

Proposed findings have been held to be not properly a part of a record. U. S. v. Forness, 125 F. (2d) 928. Assuming, however, that they were properly a part of the Toledo record, any consideration or reliance upon them in this case that would limit the scope of that adjudication particularly without admission in this record is improper and prejudicial error (See authorities, Pet. Br. p. 36).

Respondents have made numerous references in their Brief (pages 8, 33, 36) to the Toledo record as authority for their assertions. If their contention of the propriety of reference to the Toledo record and rejected findings is correct, the rule must cut both ways. This court then should consider such matters as the proposed conclusion of law, No. 7, submitted by respondent Thatcher to the Toledo Court (Toledo Record, p. 7119). Thatcher asked the Toledo Court to find that:

> "The Court finds that the acquisition of the Turner plants by General Glass Company and the participation therein by Thatcher Manufacturing Company, and the acquisition by Thatcher Manufacturing Company of an interest in said Turner plants, were legal and did not involve any restraint of trade."

Hartford requested the following conclusion of law; No. 22:

> "All the license agreements formerly in effect between Hartford and any non-defendant were lawful agreements. The intent of the parties entering into the agreement was lawful. The agreements did not in any way violate the Sherman Act" (Toledo Record, pp. 7209-7210).

Neither was adopted by the Toledo Court. If, as respondents contend, this "rejection" constitutes a determination of these issues which this court should consider as controlling, then this case must be reversed without more.

Respondents refuse to consider or attempt to refute or explain in any way whatsoever the actual finding of the Toledo Court relating to their designs upon petitioner (Finding No. 605, R. 824, Pet. Br. pp. 33-34).

CONCLUSION.

Respondents elected to rest at the close of petitioner's case. They refused to call the numerous witnesses available to them either to defeat the merits of petitioner's claim or to show any quantum meruit right to compensation in mitigation—a clear admission that such testimony would not support their answers and pleas or controvert petitioner's claims. Interstate Circuit v. U. S., 306 U. S. 208; Wahlgren v. Bauch and Lomb Optical Co., 68 Fed. (2d) 660, 663; Goldman Theatres v. Loew's, Inc., 150 Fed. (2d) 738.

Respondents' Brief in opposition to the issuance of this Writ makes amply clear the necessity of review by this court for a determination of questions of construction and

interpretation under the anti-trust laws and decisions of this court.

Denial of this petition will afford convincing support for the respondents' considered view (46 Fed. Supp. 541, 568), that their ill-gotten gains would not be lost by any enforcement of the anti-trust laws. A denial of this petition will permit to stand the statement of the Court of Appeals for the Seventh Circuit that "we are impelled to the conclusion that the licensing agreements were not inherently illegal". Petitioner believes the Supreme Court has decided otherwise.

Petitioner submits that a Writ of Certiorari should issue in this cause.

Respectfully submitted,

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FILED
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IN THE

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OCTOBER TERM, 1949.

TURNER GLASS CORPORATION,
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vs.

HARTFORD-EMPIRE COMPANY, OWENS-ILLINOIS GLASS COMPANY, HAZEL-ATLAS GLASS COMPANY, CORNING GLASS WORKS, THATCHER MANUFACTURING COMPANY, GLASS CONTAINER ASSOCIATION OF AMERICA, INC., THE STEVENSON CORPORATION,
Respondents.

No. 92.

PETITION FOR RECONSIDERATION OF PETITION FOR WRIT OF CERTIORARI.

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IN THE

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PETITION FOR RECONSIDERATION OF PETITION FOR WRIT OF CERTIORARI.

On June 1, 1949, Turner Glass Corporation filed its Petition for Writ of Certiorari, Brief in support thereof and Motion to dispense with the printing of the record in this cause. The petition presented four questions for review from the decision of the Court of Appeals for the Seventh Circuit.

On October 10, 1949, this Court granted Petitioner's motion to waive the rule requiring the printing of the record, but denied the Writ of Certiorari. Justice Black,

however, was of the opinion the writ should have been granted.

Petitioner now requests reconsideration by this Court of its petition for the issuance of a Writ of Certiorari on the single legal question of the illegality of the Hartford Empire license and lease agreements and the petitioner's correlative right to recover the license fees and royalties (stipulated as to amount) paid to respondent Hartford Empire pursuant to the illegal licenses issued by Hartford. The license fees and royalties so paid were shared by Hartford with respondent Owens, a competitor of petitioner, from 1924 until petitioner's receivership, all while respondent's conspiracy, combination and monopoly is adjudged to have been in full existence.

Petitioner's request for reconsideration is on two grounds:

First. The opinion of the Court of Appeals for the Seventh Circuit holding the Hartford license and lease agreements to be inherently legal is patently in conflict with the decision of this Court, the Findings of Fact, Conclusions of Law and judgment rendered in the case of **Hartford Empire v. United States**, 323 U. S. 386, 324 U. S. 570.

Second. Petitioner contends that the rule giving to petitioner the right to recover license fees and royalties is announced in the opinion of Justice Rutledge, concurred in by Justice Black in **Hartford Empire v. U. S.**, 323 U. S. 386, at page 443:

> "Every dollar hereafter, as well as heretofore secured from licenses on patents illegally aggregated in the combination's hands is money to which the participants are not entitled by virtue of the patent laws or others. It is the immediate product of the conspiracy."

All justices sitting (three justices took no part in the consideration of the case) concurred in the Hartford Empire case in holding that respondents here (except Stevenson Corporation) had violated the Anti-trust laws. The opinion of Justice Rutledge concurred in by Justice Black was a dissent only as to the modification of the decree.

The rule as above stated by Justices Rutledge and Black is quoted in **U. S. v. National Lead Co.**, 333 U. S. 319, at page 367, in the opinion written by Justice Douglas, with whom Justice Murphy and Justice Rutledge concurred. The dissent in the National Lead case also went only to the modification of the decree. Two justices took no part in the decision of this case.

Justice Jackson took no part in the consideration of either the **Hartford Empire** case or the **National Lead** case.

Thus, four of the eight justices who sat in these two cases have stated the rule in their opinions which petitioner contends is squarely applicable here.

In view of the decision of the Court of Appeals for the Seventh Circuit in the instant case, the law now stands that the Hartford Empire license and lease agreements were not inherently illegal. This is in square conflict with the decision of this Court in **Hartford Empire v. United States**, supra. The question of the right of a licensee under inherently illegal license and lease agreements is open unless within the rule of **Continental Wall Paper Co. v. Louis Voight & Sons**, 212 U. S. 227.

Because of the conflict of the Court of Appeals decision in this case with the decision of this Court in the **Hartford Empire** case, the announced statement of the rule applicable here and the substantial importance of the questions involved, petitioner respectfully requests the recon-

sideration of its petition for the issuance by this Court of a Writ of Certiorari on this single question.

Respectfully submitted,

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